

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
LAND DIVISION  
MISC. CAUSE NO. 10 OF 2010**

**ATTORNEY GENERAL.....APPLICANT**

**VERSUS**

**MITHA & SONS LIMITED.....RESPONDENT**

**RULING**

**BEFORE LADY JUSTICE EVA K. LUSWATA**

This application was brought under Section 9 & 14 of the Expropriated Properties Act Cap 87 and Section 98 of the CPA Cap 17 seeking for orders that:-

1. This honorable court cancels a certificate of repossession for property comprised in LRV 343 Folio 17 Plot 15 Eden Gardens Mbale District issued to the respondent by the Minister of State for Finance on the 1<sup>st</sup> April 1992.
2. A declaration that the said property is still Government property and is vested in the Departed Asian's Property custodians Board (DAPCB).
3. Costs of the application.

The motion was supported by the affidavit of the Executive Secretary of the DAPCB Bernard S. Tumwesigye. It is his case that the suit property is listed as unclaimed since the Board of Directors of the respondent company have never returned to repossess the property which has at all material times been rented out by the DAPCB and is currently occupied by Mrs. Damali Kaamuli. He also stated that the Government intends to dispose the suit property but it is constrained by the existence of a certificate of repossession that was issued in error and has never been registered on the certificate of title of the suit property. He further stated that the Criminal Investigations Department carried out investigations and discovered that the powers of attorney purported issued by the respondent to Parimal Patel were forged.

The Respondent opposed the application in an affidavit in reply which was deposed by Parimal B. Patel a lawful attorney of the respondent by virtue of the powers of attorney where he averred among others that the certificate of title and certificate of repossession of the suit property were

handed to him by Tardy Mitha one of the directors of the respondent company upon repossession of the suit property from the Government of Uganda in 1992. That the respondents' directors came to Uganda in 1992 to repossess the suit property and one of the directors Tajdi Mithahas been in Uganda ever since then the latest being in 2008. He also contended that the certificate of repossession was issued after due process of the law upon application by Tajdi Mitha on behalf of the respondent. He further contended that the suit property was occupied by the staff of Mbale Magistrates Court who vacated the same by 1<sup>st</sup> December 1992 and it was rented out by respondent to the late Weragire and Robert Kasajja and as of now it's occupied by the relatives of the late Weragire.

Tajdin Ibrahim Mitha one of the directors of the respondent company in a supplementary affidavit in reply, also contended that since 1988, he has visited Mbale, Uganda on at least 14 occasions. That came in person to formalize and submit the applications for repossession of the various properties belonging to the respondent. He also stated that after obtaining the certificate of repossession, the respondent appointed Parimal B. Patel as their lawful attorney for representing the company and managing the suit property. That since 1992 he has not been contacted by any Ugandan Authority or office in respect of the repossession of the suit property or grant of the powers of attorney. That he is the same person known and quoted as "*Tajdin Ibrahim Mitha*" or "*Tajdin Mitha*" or "*Tajin Mitha.*" Further that "*Ibrahim Mitha Kanji*" or "*Ebrahim Mitha Kanji*" or "*Ebrahim Mitha*" or "*Ibrahim Mitha*" is one and the same person and he was his father and director of the respondent company. In conclusion he stated that he is not related to Tajdin Mitha whose passport was attached in the report of the Permanent Secretary Ministry of Internal Affairs.

In an affidavit in rejoinder, Nabasa Charity a State Attorney stated that the Registrar General provided a company form which indicated that the current directors and secretaries of the respondent's directors and these indicated that the directors of the respondent are Ibrahim Mitha Kanji and Tajdin Ibrahim Mitha while the Secretary is Mariambanu Ibrahim Mitha. That according to the report from the Permanent Secretary Ministry of Internal Affairs the respondent's directors did not come back to Uganda in time to physically repossess the suit property.

Although directions were given on how and when written submissions would be made, the applicant filed late and as a result, the respondent filed their submissions first. Also I noted that no joint scheduling memorandum was filed resulting into each party raising a different set of issues. However having read the pleadings and other proceedings as well as the submissions, I have amalgamated the issues to come up with a set that should resolve the real issues before this Court.

**Issues:-**

- a) Whether the affidavit sworn by Benards Tumwesigye on 14/2/11 in support of the application is defective?
- b) Whether court should cancel the certificate of repossession issued to the respondents?
- c) Whether the claim is time barred?

It was argued for the applicant that Mr. Tumwesigye's affidavit is defective and offends S.6 of the Oaths Act because the name (Mr. Bernard S. Tumwesigye) appearing at the head of the affidavit is as the same as the one (Benard S. Tumwesigye) appearing at its foot in the *jurat*. I agree that Tumwesigye and Tumwesigire cannot be the same person and there is no oath taken by that person to rectify what the respondent considers a mere typographical error. That notwithstanding, I have looked at the Oaths Act and Commissioner for Oaths (Advocates) Act cap.5 LOU. There appears to be no section addressing such a matter, Section 5 only provides that the officer in the jurat states the place and date it is taken. Nothing has been put forward by the respondent to support their objection that the person who took the oath is not Benard S. Tumwesigye or that Benard S. Tumwesigye and Bernard S. Tumwesigire are not one and the same person. He was never even cross-examined to clarify or dispute the fact that he is the same person who is the Executive Secretary of the DAPCB. I am therefore inclined to believe counsel for the applicant that the discrepancy is the result of a typographical error, the type that can be accommodated under the provisions of Article 126 of the constitution. The objection is thereby overruled and the affidavit is thereby maintained on the record and I shall proceed to consider the application on its merits.

In my estimation, the second issue raises several sub issues which I chose to handle collectively, in the manner below;

1. Whether the repossession certificate in respect of the suit property was issued in error?
2. Whether the respondent physically returned and resided in Uganda within 120 days from the date of the authorization or repossession?
3. Whether the suit property is government property vested in the Departed Asians Property Custodian board (DAPCB)?

Annexure “O” was presented as the repossession certificate allegedly granted to the respondents on 1/4/12. It was granted to them as a company duly registered in Uganda under the companies Act, a fact which is not in dispute. I have carefully perused that document and come to the conclusion that it is not a certificate of repossession but a letter of repossession. This is a type that was issued as an administrative procedure by the DAPCB to a certain category of claimants to whom properties were returned. That document was signed by the Minister of State for Finance. In the decision on **Lutaya Vs H.G. Gandesha & Anor (1986) HCB 46**, it was held that the properties of departed Asians who were citizens of Uganda (whether individuals or companies), were never lawfully expropriated and would thus not fall under the operation of the Expropriated Properties Act, 1982 (hereinafter called the Act). For such applicants, a successful applicant for repossession would yield a repossession letter and not a certificate, the latter which was the document granted (under Section 4 and 5 of the Act) to non Ugandans whose properties were deemed expropriated. Certificates were signed by the Minister of Finance, Planning and Economic Development.

However, The above position was reversed by the decision of the Supreme Court in **Registered Trustees of Kampala Institute Vs DAPCB** (Civil Appeal 21/93 where it was held that all expropriated properties whether belonging to citizens or non citizens of Uganda at the time of expropriation, fall under and must be dealt with in accordance with the provisions of the Act. Nonetheless, repossession letters continued to exist and do not have any lesser force in law. The Court of Appeal in **Jaffer Brothers Ltd Vs Mohammed Bagalaliwo and 2 Ors CA.2/07** had the opportunity to discuss the import of a repossession letter. It was held that although it is not provided for under the Act, its content does comply with the intent and purpose of the Act which was to return properties of former owners taken over by the Military regime. I would therefore

be correct to hold that repossession letters have the same force as repossession certificates and thus, the repossession letter is for the purpose of this suit, taken in the same vein.

With respect to the first issue, the applicant argued that the certificate of repossession was issued in error because the suit property is listed as unclaimed and the directors of the respondent never returned to repossess the property. In this, they relied on a report issued by the Permanent Secretary of the Ministry of Internal Affairs dated 6/1/12. The first report indicates that a one Tadjin Mitha of French nationality had entered and exited the Entebbe International airport (four times) for a period spanning between 4/4/10 and 1/5/10. Another Tadjin Mitha of Canadian nationality was shown to having exited the Entebbe International airport (one time) on 5/1/07 (date of entry not shown) and yet, a one Tadjin Ebrahim Mitha of Canadian nationality had entered and exited the Entebbe International airport (two times) for a period spanning between 1/2/07 and 30/6/08. This they claim shows that none of the directors could have been in Uganda in time to claim repossession of the suit property in 1992.

In rebuttal, in February, by affidavit, Tadjin Ibrahim Mitha alias Tadjin Ebrahim Mitha argued that he did visit Uganda before and after repossession of the suit property. He adduced evidence by his (now expired) passport, to show that had entered and exited the Entebbe International airport (four times) for a period spanning between 30/7/89 and 4/4/92 and several other visits spanning a period between 12/1/93 and 10/6/08. Mr. Mitha's evidence was consistent and well supported by his passport. One of the entries dated 30/6/08 tallies with one of the entries submitted by the Ministry of Internal Affairs. This evidence was, not rebutted and I find it quite credible, which leads me to believe that Mr. Tadjin Ibrahim Mitha alias Tadjin Ebrahim Mitha was in Uganda when he said he was and could have presented the application for repossession.

Even if I were not to find so, I agree with counsel for the respondent that under Section 7(1) and 7 of the Act, the Minister will grant a certificate of repossession only after considering the merits of the application. I can safely assume that the Minister must have satisfied himself that the application by the respondent and her directors were in good stead with regard to the provisions of the Act and other repossession laws before granting the letter of repossession. I am not

prepared to impute any other finding other than that the repossession letter is in respect of the suit property and was validly issued to the respondent.

The applicant also attacked the conduct of the directors of the respondent after the fact of repossession. They argue strongly that the respondent by them or their directors did not physically or legally return to reside in Uganda to manage the suit property within 120 days from the date of repossession as is required by law.

Section 3(2) of the Expropriated Properties Act stipulates that;

*“nothing in this Act shall be construed as empowering the Minister to transfer property or business to a former owner unless the Minister is satisfied that the former owner shall physically return to Uganda, repossess and effectively manage the property or business.”*

Additionally, **Regulation 14 of the Expropriated properties (Repossession and disposal) (No.1) regulations S.187.8** it states that;

*“for the purposes of Section 3(2) of the Act, where the applicant is a corporate body or a firm, then at least one shareholder or partner of the corporate body or firm shall physically reside in Uganda and effectively manage the property or business”.*

Further, it provided under Section 9 (d) of the Act that:

*“where having been authorized to repossess the property or business under section 6 the former owner fails to physically return and reside in Uganda within one hundred and twenty days from the date of the authorization, the Minister may make an order that the property or business be retained by government, or be sold or disposed of in such manner as may be stipulated in the regulations made under this Act; except that in the case of a registered business or enterprise, the Minister may, on being satisfied that the minority interests in the business or enterprise, the Minister maybe unduly prejudiced by an order made under this section, give such other directions as he or she deems fit”.*

Stemming from the above provisions, it appears to be a mandatory requirement that in the case of a registered company, one of the directors or shareholder must physically return and reside in Uganda and manage the suit property within 120 days of the repossession date failing which, the

Minister may be moved to make an order for the property belonging to such company to be retained by Government, sold or disposed of in any other manner.

It was submitted for the applicant that none of the directors or secretary of the respondent ever returned to Uganda after the date of repossession. In this, the applicant relied on a report of the Permanent Secretary Ministry of Internal affairs that indicated that Tadjin Mitha, a director of the company had made a few visits in and out of Uganda and had no permanent residence here as envisaged under the Immigration Act whereby he would need to have applied for and obtained a certificate of residence in Uganda. The respondent argued that Tadjin Mitha one of her directors, did return to Uganda to reposses and manage the suit property within the designated 120 days period.

Notwithstanding the arguments made for the respondent, I do agree with counsel for the applicant that the visits by Tadjin Mitha in and out of Uganda would not amount to physical return by him to reside in Uganda. None of his visits in the time immediately after repossession lasted more than 17 days. Nonetheless, he stated and produced Annexure "C" in which the respondent appointed one Parimal B. Patel as their agent in Uganda.

Mr. Patel also swore an affidavit in which he stated that he was indeed the agent of the company in full control of the suit premises in which he had at one time placed and had collected rent from tenants on behalf of the respondent, his principal. Against that evidence, counsel for the applicants argued that the respondent's authorisation of Mr. Patel as an agent for the respondent were "*questionable*". By no stretch of imagination can such an opinion be taken to be an expert opinion on the matter. In any case, beyond that report, the applicant did not put forward any other proof to support the allegation that the authorisation was forged, and even if they had, in my view, proceedings by motion would not fully accommodate the required proof of forgery or fraud. On the other hand, the respondent showed that the document was properly signed and attested by a Notary Public and then registered in Uganda under the Registration of Documents Act and could thus be used as evidence in this court. I do agree entirely with counsel for the respondent on this point.

The question then would be, in view of the provisions of Sections 3 and 9 the Act, could the respondent act through an agent or attorney?

Section 9 required that the former owner ought to return and reside in Uganda. This is not a mere entry into the country but one where it is envisaged that the repossessed property is then managed or put under effective management. It has repeatedly been sounded by the courts of record that the Act being a remedial statute (i.e. one meant to correct the mistakes of the military regime), it should be constructed liberally in order not to perpetuate the mischief it is intended to address. (See for example **Registered Trustees of Kampala Vs DAPCB (supra)** and **Jaffer Brothers Ltd Vs Mohammed Bagalaliwo & 2 Ors (supra)**). Therefore, I am not persuaded that the spirit of the Act is such that a former owner could not manage a reposed property through an agent for as long as such agent was legally appointed in a manner that would give him/her full powers of the principal, going by the principle with provision that the property is put under *effective* management. Besides as was laid down in **Saimon Vs Salmon (1987) AC 22**, the respondent as a body corporate, could act through an attorney duly appointed by them. Further, although the Act was promulgated to deal with registered land expropriated properties, the principle Act dealing with matters concerned with properties, in Uganda whether expropriated or not would be the Registration of Tittles Act (RTA).

According to Section 146 (RTA),

*“the proprietor of any land under the operation of this act ..... may appoint any person to act for him or her in ..... dealing with it by signing a power of attorney in the form in the sixteenth schedule of this Act”.*

According to section 146(4), the contents of the power attorney need not conform exactly to the wording given in the sixteenth schedule. It is sufficient that the wording gives the effect of appointing an attorney. I have noted that Exhibit “C” is not titled but it is clear in its content that on 20/1/92, the respondent appointed Mr. Parimal B. Patel as their agent and manager for the suit property with powers and authority inter alia to collect rent from tenants therein, pay taxes and other occupier charges, maintain the property in good repair, protect it from trespassers, with written notice grant leases, commence any action or other legal proceedings to preserve their



rights as landlords and owner of the suit property and *“generally to execute and perform any other act, deed or thing whatsoever relating to the said premises as fully and effectually to all intents and purposes whatsoever as the landlord himself could do it if personally present the landlord hereby agreeing to ratify and conform whatever the agent shall lawfully do or cause to be doing in relation to the said premises”*.

It is not in dispute that Mr. Patel has always presented himself as the agent of the respondent. His appointment in January 1992 (about two months prior to the repossession date) has never been revoked. It must have run continuously during the 120 days statutory period to date which would make the presence of the respondent on the suit property as registered owner and manager effective and legitimate. On the other hand, the arguments by the applicant that the respondent is not in possession of the suit property are doubtful. Although receipts were produced to show that the DAPCB was collecting rent in respect of the property from one Grace Obace, no evidence was brought forward from the DAPCB or Ms Obace herself to confirm that fact. In fact, the receipts represent the period 1/12/10 to 28/2/11 a period well after the property was repossessed by the respondent. In any case under Section 6 of the Act, by issuing a certificate of repossession/repossession letter to the respondent, the property was formerly returned to the respondent and the Government of Uganda ceased to have control over it and as such, any rent collected by the DAPCB (if at all) was so collected in error, conversely, the respondent produced un rebutted evidence (in Annexure RH to Ms Patel’s affidavit) that on 9/4/92, Mr. Patel formerly requested for vacant possession of the suit property. In response, the District Executive Secretary Mbale wrote to the Chief Magistrate of Mbale requesting that the staff of the court in occupation of the suit property vacate by 27/11/92 and in his communication of 17/11/92, the Chief Magistrate complied. The evidence of Mr. Patel is supported by Ms Farida Namukwaya Weragire when in her affidavit she deposes that she and her late husband Muhammed Weragire occupied the suit property until 1999. That even after his death, she continues with his family members to reside in the suit property albeit without paying rent. Her only responsibility is to pay for utility bills and maintain the premises. She denies knowledge of Damali Kaamuli or her occupation of the suit premises. I find the evidence of the respondent on this aspect credible and do agree that Mr. Patel is an authorised attorney of the respondent with full and effective management of the suit property within the meaning of Section 9 of the Act.

In summary I find no lawful or justifiable reason to cancel the repossession letter granted to the respondent and thus, the second issue is decided in favour of the respondent.

### **Whether the claim is time barred?**

It was argued for the respondent that 20 years have lapsed since the certificate of repossession was issued making the claim in the motion time barred. Counsel relied on Section 5 of the Limitation Act that bars claims for the recovery of land after the expiration of 12 years. In reply, counsel for the applicant argued that the claim was not one for the recovery of land but for cancellation of the certificate of repossession on the ground that the respondent did not physically return and reside in Uganda within 120 days from the date of repossession. That no time limit is stipulated under any law against which an action can be brought for cancellation of a certificate of repossession, where Section 9 has not been complied with. They argued therefore, that the applicant can at any time upon discovery of non compliance with Section 9(d) of the Act, move court for the appropriate orders. Counsel further argued that the applicant having failed to comply with the law, the property remained the property of the Government of Uganda (hereinafter GOU) and it was for that reason, that the repossession certificate has never been registered on the certificate of title in respect of the suit property. I disagree with the submissions made for the applicant on the following grounds.

The applicant seeks an order to cancel the repossession certificate issued to the respondent for non compliance of the provisions of Section 9 of the Act. By its preamble, the Act is meant to provide for the transfer of the properties and businesses acquired or otherwise expropriated during the military regime to the Ministry of Finance, to provide for the return to former owners or disposal of the property by the Government. Therefore if I were to allow the application, the property would be retained by the Government through a ministerial order. Nothing in the Act indicates that its provisions are exempted from the bar of limitation. It is not in dispute that once a certificate was granted to the respondent as a former owner in accordance with the Act, the GOU was relinquishing any claim to the suit property to the respondent who is the registered proprietor. Therefore, cancellation of the certificate would amount to recovery of the land to

which that certificate refers from the respondent to the GOU making it a claim for recovery of land.

Section 5 of the Limitation Act creates a bar against any claims filed 12 years after the cause of action arose. Section 30 of the Limitation Act provides that limitation applies to proceedings by and against the government as they would apply to proceedings between private persons. Again, the facts of this case do not present an exception if that would otherwise exempt the GOU under section 31 of the Limitation Act. I therefore agree with counsel for the respondent that since the repossession certificate was issued on 1/4/92 the cause of action against the respondent would begin to run a day after the 120 days after the repossession date. It could never have been the intention of the Act that omissions of former owners (for example to return and manage repossessed property) would continue in perpetuity until noticed by GOU or any other aggrieved party in general. This would go against the very root of the law of limitation law and closure of disputes generally. On that aspect alone, I find that the claim is time barred.

Secondly, I have reservations against the procedure followed by the applicants. According to Section 9, of the Act, it is the Minister and not this court to make an order that the property in question be retained by Government or disposed of in any other manner according to law. This of course would happen only after he/she has satisfied herself that the former owner has failed after repossession to return to Uganda to manage the property within 120 days. The Act must have envisaged that in such cases, the former owner would have been returned the property only by issuance of a certificate or letter of repossession, and therefore, its existence would not prevent the Minister from making the order. The proper procedure therefore should have been that for the applicant to move the Minister to make the appropriate orders under section 9 of the Act. Had the Minister declined to do so, then that decision would have been subject to appeal to this court under Section 15 of the Act. I do agree that once the certificate of repossession is issued, the Minister or the GOU would cease to have any dealings or power over that land. However, the provisions of Section 9 of the Act, clearly created an exception to this rule by giving the Minister power to make an order for the GOU to deal in the repossessed property after the expiration of the statutory 120 days, and that would be only in those cases where the former owner failed to return to manage the repossessed property. As no order was made by the

Minister within the statutory period, this would thus make the application premature. In my estimation, even if the applicant was to follow the correct procedure under the Act, the action would still be well out time.

The above two aspects would mean that not only is the claim bad in law, for being premature it is also time barred and cannot be sustained against the respondent. I therefore also find the third issue in favour of the respondent.

In conclusion, the applicant has not succeeded on all three issues and accordingly this application is dismissed with costs to the respondent.

I so order.

**EVA K. LUSWATA**  
**JUDGE**  
**10<sup>th</sup> October 2014**